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In the  
Supreme Court of the United States

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OCTOBER TERM, 1991  
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QUILL CORP.  
PETITIONER

v.

NORTH DAKOTA  
RESPONDENT

\_\_\_\_\_  
ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF NORTH DAKOTA  
\_\_\_\_\_

BRIEF OF AMICUS CURIAE,  
TAX POLICY RESEARCH PROJECT  
IN SUPPORT OF RESPONDENT  
\_\_\_\_\_

RITA MARIE CAIN  
TAX POLICY RESEARCH PROJECT  
BLOCH SCHOOL OF BUSINESS AND PUBLIC ADMINISTRATION  
UNIVERSITY OF MISSOURI-KANSAS CITY  
5110 Cherry  
Kansas City, MO 64110  
816-235-2326  
Counsel of Record for Amicus Curiae

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## INTEREST OF THE AMICUS CURIAE

The Tax Policy Research Project is a consortium of faculty researchers at the Bloch School of Business and Public Administration, University of Missouri--Kansas City. The Tax Policy Research Project seeks to improve public awareness about the role tax policy plays in legal, political and social decisions.

In *Quill Corp. v. North Dakota*, the Tax Policy Research Project is interested in seeing the Court apply its modern interstate taxation analysis to direct mail marketing transactions. The current tax treatment for these transactions, which stems from the Court's 1967 decision in *National Bellas Hess v. Department of Revenue*, does not conform to the analysis applied to other interstate transactions today nor to the realities of modern commercial practice. The Tax Policy Research Project believes direct mail sellers' present exemption from tax collection no longer is supported by the law or the facts.

## SUMMARY OF ARGUMENT

In 1977, the Court established its current analysis for interstate taxation issues, which departed from earlier, varied approaches such as that espoused in *National Bellas Hess*. As a result, modern commerce clause and due process analyses for constitutional interstate taxation do not apply to Petitioner when it seeks to avoid collecting an otherwise constitutional tax. Petitioner's only legitimate due process protections are articulated in personal jurisdiction cases, which support North Dakota's ability to pursue Petitioner for use tax remittance.

## ARGUMENT

- I. Interstate taxation law no longer justifies Petitioner's challenge to North Dakota's use tax collection requirement.

The North Dakota Supreme Court explained that the consumer ultimately was responsible to pay the use tax in

question in this case. *State v. Quill Corp.*, 470 N.W. 2d 203, 205 (N.D. 1991). Retailers like Petitioner only are required to collect the tax and remit it to the state. Section 57-40.2-07, N.D.C.C. Under modern interstate taxation cases, such a tax is constitutionally permissible. Further, these cases provide no basis for retailers to challenge their collection obligation under these permissible tax schemes.

In *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), this Court held that a state tax on interstate commerce was constitutional if the state had sufficient contacts with the activity taxed and if the state conferred sufficient benefits on the taxpayer to justify the tax. Here, the activity taxed is storage, use or consumption within North Dakota. 57-40.2-01, N.D.C.C. The taxpayer is the North Dakota consumer to whom Petitioner delivers goods for use in the state. Such a use tax scheme satisfies the constitutional benefits and nexus requirements articulated in *Complete Auto Transit*.

The relationship of North Dakota here to the taxpayer and the tax collecting agent is analogous to those relations in *Goldberg v. Sweet*, 488 U.S. 252 (1989). In *Goldberg*, Illinois telephone customers paid the telecommunications tax on long distance calls to or from an in-state phone, that were billed to in-state addresses. Long distance service providers, such as MCI and Sprint, were required to collect the tax and remit it to the state. This Court upheld the tax based on *Complete Auto Transit*. 488 U.S. at 259.

In *Goldberg*, this Court had "little difficulty concluding that the Tax Act is fairly related to the benefits received by Illinois telephone consumers." 488 U.S. at 267. Further, Illinois proved sufficient nexus with the activity taxed: long distance calling to and from the state, when the call is charged to an in-state service address. 488 U.S. at 263. Despite a challenge by long-distance service providers who were required to collect the tax, *Goldberg* did not require the state to show nexus or benefits or any other due process protections vis-a-vis the long distance service providers, to support their collection obligation. Today, North Dakota's use taxation and collection scheme mirrors the Illinois telecommunication tax upheld in *Goldberg*. "The tax at issue has many characteristics of a sales tax. It is



assessed on an individual consumer, collected by the retailer, and accompanies the retail purchase . . . ." 488 U.S. at 262.<sup>1</sup>

In *Complete Auto Transit* and *Goldberg*, the Court focused its benefits and nexus analyses solely on the taxpayer and the activity taxed. Nevertheless, Petitioner continues to insist that North Dakota must confer benefits upon and maintain contacts with out-of-state tax collecting retailers such as Petitioner.<sup>2</sup> Petitioner relies on *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967), which held that a state lacks the power to require tax collection when a seller does "no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Id.* at 758.

Petitioner's continued reliance on this 1967 precedent ignores the Court's deliberate departure from its earlier interstate taxation analyses when it articulated the revised nexus and benefits requirements in *Complete Auto Transit*. This Court has described pre-*Complete Auto Transit* cases, such as *National Bellas Hess*, as creating a "wavering doctrinal line," of authority regarding interstate taxation. See, *Goldberg*, 488 U.S. at 259. Yet, Petitioner urges the Court to return to this "wavering" line of reasoning when it presses for continued application of the *National Bellas Hess* constitutional analysis.<sup>3</sup>

<sup>1</sup> Petitioner argues that Congress is the appropriate body to establish any tax collection burden in these interstate transactions. Petitioner's Brief at 47. This Court's decision in *Goldberg* that upheld a comparable state tax, including the collection obligation, seriously undermines that conclusion.

<sup>2</sup> Petitioner does not assert that the tax is uncollectible from North Dakota consumers, thus transforming Petitioner into the party liable to pay the tax. Rather, Petitioner simply blurs the distinction between tax payment liability and the tax collection requirement. Petitioner's Brief at 29-31. Petitioner's approach defies the Court's realistic distinction between the obligations of the taxpayer and the tax collecting agents in *Goldberg*, 488 U.S. at 262.

<sup>3</sup> Admittedly, this Court favorably cited *National Bellas Hess* in *Goldberg*. 488 U.S. at 263. However, *National Bellas Hess* is cited for its guidance on the proportionality requirement of *Complete Auto Transit*, not on the nexus and benefit elements. In citing *National Bellas Hess*, the *Goldberg* Court said not every phone call received in the state could be taxed by Illinois. 488 U.S. at 263. However, Illinois only taxed the calls that also were charged to an in-state address, which was both internally and externally consistent. 488 U.S. at 265. Petitioner does not challenge the North Dakota use tax on these grounds.

Based on *Complete Auto Transit*, a use tax scheme in which North Dakota consumers pay North Dakota for use of goods in the state is constitutional. Earlier interstate tax cases, such as *National Bellas Hess*, with their varied approaches to the commerce clause and to due process, have been replaced with an interstate taxation analysis that does not support a retailer's attempt to avoid tax collection and remittance under an otherwise legitimate tax law.

## II. Modern personal jurisdiction cases explain Petitioner's due process protections.

The only nexus requirement that North Dakota must satisfy regarding Petitioner is the due process "minimum contacts" standard for personal jurisdiction when the state sues Petitioner for failing to remit applicable use tax liability. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). North Dakota can satisfy that due process requirement regarding Petitioner and, presumably, many other mail-order vendors.<sup>4</sup>

This Court has held that physical presence is unnecessary for a court to exercise personal jurisdiction over an out-of-territory defendant. *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). Contemporary jurisdiction cases recognize that commercial activity purposefully directed to a state, without any physical presence, will satisfy due process minimum contacts requirements. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

The North Dakota Supreme Court articulated the extent of Petitioner's purposeful sales activity directed at North Dakota and its consumers: annually, Petitioner mailed more than 230,000 separate pieces of mail (24 tons) into the state. As a result, Petitioner received over 200,000 orders from 3500 active North Dakota customers, valued at \$1,000,000.

<sup>4</sup> Historical distinctions between the due process analyses for personal jurisdiction, tax collection and tax payment have disappeared as the Court honed its interstate tax analysis and focused that analysis on the taxpayer. See McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U.L. Rev. 265 (1985). Petitioner's only support for continued distinct due process standards for personal jurisdiction and tax collection are *National Bellas Hess* and a case that pre-dates *National Bellas Hess*. Petitioner's Brief at 33.

470 N.W. 2d at 204-05. The state's pursuit of such an active solicitor for use tax remittance hardly offends traditional notions of fair play and substantial justice.<sup>5</sup>

#### CONCLUSION

Obviously, affirming the North Dakota result will render *National Bellas Hess* the same as many other pre-*Complete Auto Transit* cases: a piece of constitutional history. But, when the facts that supported *National Bellas Hess* have dramatically changed, then the law those facts spawned must yield. See e.g. *Burger King*, 471 U.S. at 476. ("It is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines,...")

Upholding the state tax collection requirement on mail-order retailers will confirm that modern constitutional law must not defy modern life, in which mail buying and selling is a common occurrence. *Complete Auto Transit* overruled the long-standing *Spector*<sup>6</sup> rule of interstate taxation because it had been completely "stripped of any practical significance." 430 U.S. at 288. Now, the same can be said of *National Bellas Hess* and the Court should respond accordingly.

Respectfully submitted,

Rita Marie Cain  
Tax Policy Research Project  
Bloch School of Business  
and Public Administration  
University of Missouri--Kansas City  
5110 Cherry  
Kansas City, MO 64110  
816-235-2326  
*Counsel of Record for Amicus Curiae.*

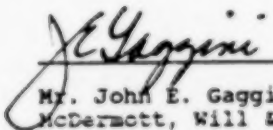
<sup>5</sup> Nothing in the North Dakota opinion indicates that Petitioner ever objected to the North Dakota courts' jurisdiction over it.

<sup>6</sup> See *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951).

#### EXHIBIT ONE

##### Permission to File Brief of Amicus Curiae

Pursuant to Supreme Court Rule 37.03, Quill Corp., Petitioner in Quill Corp. v. North Dakota, consents to the filing of an amicus curiae brief by the Tax Policy Research Project, University of Missouri--Kansas City.

  
Mr. John E. Gaggini  
McDermott, Will & Emery  
227 W. Monroe St.  
Chicago, IL 60606

Attorney for Petitioner  
Quill Corp.

## EXHIBIT TWO

### Permission to File Brief of Amicus Curiae

Pursuant to Supreme Court Rule 37.03, the State of North Dakota, Respondent in Quill Corp. v. North Dakota, consents to the filing of an amicus curiae brief by the Tax Policy Research Project, University of Missouri--Kansas City.



Nicholas J. Spaeth  
Attorney General  
Office of Attorney General  
State Capitol  
900 East Boulevard Avenue  
Bismarck, North Dakota 58505  
(701) 224-3640

Attorneys for Respondent State of  
North Dakota